BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT M. JUNG	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,040,452
PROGRESSIVE COMMUNICATION PRODUCTS	)	
Respondent	)	
AND	)	
	)	
STATE FARM FIRE & CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the July 24, 2008 preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded preliminary benefits after the ALJ determined that claimant's job involved substantial travel and the accident did not preclude claimant from receiving benefits, notwithstanding the "going and coming" rule of K.S.A. 44-508(f).

Claimant appeared by his attorney, Derek R. Chappell of Ottawa, Kansas. Respondent and its insurance carrier appeared by their attorney, Denise E. Tomasic of Kansas City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held July 23, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant's accident and resulting injuries arise out of and in the course of his employment with respondent? Respondent contends the "going and coming" rule of K.S.A. 44-508(f) precluded claimant from receiving workers compensation benefits as claimant was involved in an automobile accident while returning to a job during his

lunch break. Claimant contends that travel was an integral part of his job and the injury should be compensable.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked for respondent as a service manager installing and servicing business telephone systems. This job required claimant to be away from respondent's Lenexa, Kansas central location approximately 90% of the time. Claimant lived in Ottawa, Kansas and commuted to work in the Kansas City metro area daily. Claimant was provided with a company truck which he kept with him in Ottawa and used for company business only. Respondent paid for the maintenance, gas and insurance on the truck. When claimant left Ottawa, he would occasionally go to respondent's central location. He would also, many times, go directly to a job site. Claimant would also go from job to job in the KC metro area, working as many as 8 jobs on a single day. Some jobs also required that claimant remain at a single location for several days.

On May 6, 2008, claimant and a co-worker, Jason Pagacz, met at a job in Lee's Summit, Missouri, to begin installing a telephone system at the Lee's Summit Nissan Dodge. Mr. Pagacz also had a company truck and they met at the job. They worked until about 11:30 a.m. and then went to lunch. Mr. Pagacz drove claimant to a Quik Trip 2-3 miles from the job where they took about 15 minutes to eat. Their lunch was short as they were behind schedule that day with their work. On the return trip, they were struck on the passenger side of the truck by another vehicle. Claimant was injured. The truck was rolled, landing on its side. Claimant was taken by ambulance to a local hospital and was later diagnosed with a fracture of the spinous process at C-6. Claimant underwent conservative care, ultimately returning to work for respondent as a dispatcher, at a comparable wage. At the time of the preliminary hearing, claimant continued working for respondent in that capacity.

Raymond Schmidt, respondent's president and owner, testified that the company trucks were for work only and the employees were allowed to take them from job to job, with some jobs starting with travel directly from an employee's home. Lunch was taken whenever convenient and usually was about 30 minutes in length, although Mr. Schmidt did acknowledge that occasionally, he would miss lunch if too busy with work. This, he agreed, was for the betterment of the company. Respondent's workers were not required to go to lunch. Workers were not paid for the time they were at lunch. However, claimant was a salaried employee and did not get overtime pay.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.[5]

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[1] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2007 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[5] K.S.A. 2007 Supp. 44-508(f).

> The "going and coming" rule is based upon the premise that, while on the way to or from work, the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Therefore, such risks are not causally related to the employment.[6]

There is an exception to the "going and coming" rule when travel upon the public roadways is an integral or necessary part of the employment.[7]

> In the case of a major deviation from the business purpose, most courts will bar compensation recovery on the theory that the deviation is so substantial that the employee must be deemed to have abandoned any business purpose and consequently cannot recover for injuries received, even though he or she has ceased the deviation and is returning to the business route or purpose.[8]

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[9]

A situation similar to this case is discussed in *Messenger.*[10] In *Messenger*, the claimant was killed while traveling home from a distant drill site. The Kansas Court of Appeals noted in *Messenger* that:

> Kansas has long recognized one very basic exception to the "going and coming" rule. That exception applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.[11]

Claimant spent 90% of his time doing installation jobs in the KC metro area, which required him to travel. This travel was accomplished while in a company truck which claimant kept with him at all times, even taking it home at night.

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[6] *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 289, 144 P.3d 668 (2006).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[8] *Kindel* at 284.

[9] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[10] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[11] *Id.* at 437.

The Board determined a matter very similar to this incident in *Anthony v. United Parcel Service, Inc.*, No. 1,037,950, 2008 WL 2354935 (Kan. WCAB May 6, 2008). In *Anthony*, the claimant was a delivery driver who was injured while going into a restaurant for lunch. The Board held that travel was an integral part of Anthony's job and, as such, while away from his employer's premises, Anthony was usually considered to be within the course of his employment continuously during the trip. The Board Member who determined *Anthony* noted the exception to the "going and coming" rule as discussed in *Messenger*, regarding travel being an integral part of the employment.

Here, claimant's job required he be working away from respondent's central location 90% of the time. Thus, travel is clearly an integral part of his job and the "going and coming" rule would not apply to deprive claimant of workers compensation benefits in this situation. The determination by the ALJ that claimant is entitled to workers compensation benefits as the result of this accident is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant's job required that he travel regularly and that travel was an integral part of that job. Thus, the restrictions of the "going and coming" rule do not apply to this accident. Claimant has satisfied his burden that he suffered an accidental injury which arose out of and in the course of his employment with respondent. The Order of the ALJ which granted claimant preliminary benefits should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated July 24, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[12] K.S.A. 44-534a.

Dated this ____ day of September, 2008.

HONORABLE GARY M. KORTE

c: Derek R. Chappell, Attorney for Claimant
Denise E. Tomasic, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge